IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1070

HARRY KOHLBERG,
Petitioner,

v.

JOSEPH LYNN WALKER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Harry Kohlberg, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit

is not recorded.

The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is not recorded.

The opinion of the United States Bankruptcy Judge at Norfolk is not recorded.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fourth Circuit was October 19, 1978. No re-hearing was requested. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court's jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Where the Bankruptcy Judge ruled that petitioner was not entitled to relief because of estoppel by asking for and accepting a promissory note for the amount of his claim and cited two authorities which were not relevant, and the United States District Court reversed the Bankruptcy Judge and held that petitioner's judgment was not dischargeable in bankruptcy, did the Court of Appeals err in holding that Bankruptcy Rule 810 required the District Court to accept the referee's findings of fact unless they are clearly erroneous, since the Bankruptcy Judge's holding of estoppel, was a conclusion and inference from facts not in dispute?

II. Did the Bankruptcy Judge err in entering his order of April 19, 1976,

denying petitioner's motion to amend the complaint to include a second count under Clause (4) of Sec. 17 a of the Bankruptcy Act, where the complaint was timely filed, a proposed amendment was proper under Bankruptcy Rule 715 and under the Federal Rules of Civil Procedure, Rule 15 (a), (b), (c), the Bankruptcy Judge sustaining the plea of the Statute of Limitations.

STATUTES INVOLVED

The statutes involved are:

1. The Bankruptcy Rule 810, to-wit:

"Upon an appeal, the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses."

2. 11 U.S.C.A. Sec. 32 (b) (1) to-wit:

"The court shall make an order

"fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to section 35 (c) (2) of this title to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94 (b) of this title. The Court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications."

3. Section 11 U.S.C.A. 35 (a):

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as. . . (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused

"to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; . . .(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity;. . .

"(c) (2) A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision (a) of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 32 of this title and, unless an application is timely filed, the debt shall be discharged. . .

"(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof . . ."

4. Federal Rule of Civil Procedure 15 (a), (b), (c) to-wit:

"(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

"(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made

"upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

"(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of

"the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

5. Bankruptcy Rule 715 to-wit:

"Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings except that (1) a pleading to which no responsive pleading is permitted may be amended as a matter of course at any time within 15 days after it is served but before the date set for trial and that (2) a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 5 days after service of the amended pleading, whichever period may be longer, unless the

"court otherwise orders."

6. Bankruptcy Rule 806 to-wit:

"Within 10 days after filing the notice of appeal the appellant shall file with the referee and serve on the appellee a designation of the contents for inclusion in the record on appeal and a statement of the issues he intends to present on the appeal. The record shall include the contents so designated and the findings of fact, conclusions of law, and orders entered thereon. If the appellee deems any other papers to be necessary, he shall, within 7 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional papers to be included. If the record designated by any party includes a transcript of any proceeding or a part thereof, he shall immediately after the designation order the transcript and make satisfactory arrangements for payment of its costs. All parties shall take any other action necessary to enable the referee to assemble and transmit the record."

7. Bankruptcy Rule 802 (a) to-wit:

"(a) TEN-DAY PERIOD. The notice of appeal shall be filed with the referee within 10 days

"of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."

STATEMENT OF THE CASE

The Complaint of Kohlberg prays that an order be entered that the obligation of Walker to him is not released or affected by the adjudication of bankruptcy and that a judgment be entered against Walker in the sum of $148,900.00, stating that the debt was non-dischargeable under clause (2) of Sec. 17 a of the Bankruptcy Act, alleging that Walker obtained from Kohlberg from 1967-1973 the sum of $148,900.00 as a result of oral representations made to Kohlberg that Walker was solvent and that Walker had funds to repay Kohlberg,

with interest, on demand; that Walker knew during said period of time that he was not solvent and that he did not have funds to pay Kohlberg, with interest, on demand; that Walker intended to induce Kohlberg to advance the money on the basis of the representation; that Walker obtained money from Kohlberg by means of pretenses and false representations; that said false pretenses and representations were made with an intent to induce Kohlberg to advance funds to Walker. Walker's answer to the complaint denied each allegation of the complaint. No pleading was filed by Walker challenging the sufficiency of the complaint.

Thereafter, Kohlberg filed a motion to amend the complaint to include the following count, to-wit:

> "Defendant bankrupt created debts by his fraud, embezzlement,

> "misappropriation, or defalcation of funds due the plaintiff while the bankrupt was acting as an officer or in a fiduciary capacity." (App. 6)

An order was entered on April 19, 1976 denying leave to amend the complaint on the ground that it was not filed within the deadline set by the Court of March 3, 1976. (App. 7, 8).

The order of discharge entered by the Bankruptcy Judge on June 3, 1976 expressly found as a fact that Walker was guilty of fraud (App. 9-11). The order of discharge, relating to fraud, states:

> "This is the case of the unfaithful master and the loyal servant.
>
> "The conduct of Joseph Lynn Walker, the bankrupt here; Joseph L. Walker Corp.; and Walker Realty Co., in their relationship with Harry Kohlberg, the plaintiff, is clearly reprehensible.
>
> "...by his complaint for the determination of the discharge-

"ability of the debt, Kohlberg seeks to have the amount owing him, $148,900.00, saved from the bankrupt's discharge alleging the bankrupt obtained the funds by false pretenses and false representations.

"The Court finds the Walker organization's modus operandi a deceptive one, a system of taking from Peter to pay Paul, of existing on expectations for a better tomorrow and of tactics to camouflage its inability to meet its obligations to Kohlberg.

"With office account cards lost and thrown out - Kohlberg was able to salvage some - Walker cannot completely explain the organization's financial picture. Further, a most peculiar system of accounting existed. A witness, Lucille S. Miller, Walker's secretary and secretary of the corporation, testified she never knew the difference between the Walker Corporation and the Walker Company. At a sales meeting held on or about April 6, 1967, Walker presented a commissions bonus check in the amount of $3,430.25 to Kohlberg; however, the check was unsigned - Walker did not have the funds - and it was used ostentatiously before the other salesmen as a carrot on a stick. The best testimony is that the organization was in constant financial difficulty.

"One employee testified the business was in trouble when he came in 1959 and was still in trouble in 1972 when he left. Even the maintenance man left in 1973 after thirteen years service to find more secure employment.

"Indeed, there unfolds the picture of a business somewhat of the strain of the Brown empire where the Court found a course of dealing in expectations sufficient grounds for denial of the bankrupt's entire discharge. <u>In re William Angus Brown</u>, Bankruptcy No. 75-365-N. The rule too simply stated in English is that issuing from <u>In re James</u>, 181 F. 476 (4th Cir. 1910), app. den. 227 U.S. 410: The Walker organization's system of taking another's money, smiling about the good times, yet being unable, knowingly, to meet the obligations to Kohlberg, is out and out the dirty hands doctrine which clearly endangers one's discharge in bankruptcy.

"The renown, classic case on the subject of false pretenses and false representations is <u>Sweet v. Ritter Finance Co.</u>, 263 F. Supp. 540 (W.D. Va. 1967). See <u>Hartford Accident & Indemnity Co. v. Flanagan</u>, 28 F. Supp. 415 (D. Ohio 1939), which states, "Public policy forbids the discharge of a bankrupt from debts incurred through fraud

"while acting as an officer
(of a corporation) or in a
fiduciary capacity. . ."

The Bankruptcy Judge however ruled that Kohlberg was not entitled to relief because of estoppel, saying:

> "Ah, but woe! As reprehensible as was defendant's conduct, Kohlberg by the doctrine of estoppel is denied the relief sued for.
>
> "Kohlberg had positive knowledge of the financial difficulties certainly as early as 1967; nevertheless, he agreed at that time to a deferment of his commission payments. He rode along as a willing sucker. (Definition 6, Webster's Third New International Dictionary) In 1973 he asked for and accepted a note in satisfaction of his claim. The acceptance of a note in satisfaction of money previously obtained by a bankrupt even if obtained by fraud, is not within the meaning of the exception to discharge contained in Section 17a(2), 11 U.S.C. 35 (a) (2). By such acceptance one is estopped. 8 Remington On Bankruptcy, Section 3325; 1A Collier On Bankruptcy, Section 17.16(2)." (App. 11, 12)

The statement of issues Kohlberg

intended to present on the appeal to the District Court alleged that the Bankruptcy Judge erred in holding that Kohlberg by the doctrine of estoppel was denied the relief sued for, in holding that Kohlberg had positive knowledge of the bankrupt's financial difficulties as early as 1967; that Kohlberg was estopped by asking for and accepting a note in satisfaction of his cliam in 1973; that the debt be discharged in bankruptcy; in denying Kohlberg's motion to amend his complaint (App. 14, 15).

The memorandum order of District Court Judge MacKenzie correctly addressed himself to the issue of estoppel pointing out:

> "Judge Bonney based his holding on two fact findings: (1) that Kohlberg knew as early as 1967 that Walker was in financial trouble, and (2) that, in 1973, Kohlberg asked for and accepted

"a note in satisfaction of his claim. Although these two fact findings are supported by substantial evidence, we do not believe they justify the conclusion that Kohlberg is estopped.

"The better authority holds that the taking of a note, with respect to a liability for fraud, even at a time when the creditor knows of the fraud, is not an estoppel to setting up Section 17 (a) (2) of the Bankruptcy Act in avoidance of a discharge. See authorities collected in 145 ALR 1238. Of like authority is 8 Remington on Bankruptcy § 3325 (6th Edition, 1976 Supplement), Page 187 which states:

"The taking of a note with respect to liability for fraud is not an estoppel to setting up the fraud in avoidance of a plea of discharge in an action on the note.

"1A Collier on Bankruptcy, §17.16 (2) relevant not to the issue of estoppel, but rather to the issue of what constitutes "money or property."

In addition, the District Court Judge correctly held that the evidence was sufficient to show actual fraud, writing:

"Section 17 (a) (2) of the Bankruptcy Act reads, in pertinent part:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities for obtaining money or property by false pretenses or representations.

"For the debt owed to Kohlberg to have been rendered non-dischargeable under this section, he had to prove actual fraud, or more specifically:

"(1) that money or property was obtained by false pretenses or representations;

"(2) that the bankrupt had thereby engaged in moral turpitude or an intentional wrong;

"(3) that the representations were knowingly and fraudulently made;

"(4) that the representations were reasonably relied upon by Kohlberg.

"1A Collier § 17.16, at 1633 et seq; Sweet v. Ritter Finance Co., 263 F. Supp. 540, 543 (W.D. Va. 1967).

"An examination of the testimony indicates that Kohlberg met

"his burden. Looking beyond the estoppel, which we find inapplicable here, Kohlberg's knowledge of the financial problems of Walker did not, in our judgment, make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which, we find, were relied on by Kohlberg.

"The action of the Bankruptcy Judge in finding that the Walker debt to Kohlberg in the amount of $143,842.73 was discharged, is REVERSED, and the discharge, as to this debt, is DENIED."

Kohlberg testified that he worked from 1963 to 1973 as a salesman for Joseph L. Walker Realty Corporation (App. 23, 24). From 1963 to 1967, he placed his own funds in special accounts to the bankrupt's corporation, which had agreed to pay interest of 1 percent per month on his funds (App. 25, 26). The source of his funds was retirement checks from the U. S. Navy, savings in banks and savings and loan institutions

(App. 26). The bankrupt's corporation of which he was sole stockholder, was to place Kohlberg's funds in special accounts, to-wit: (1) Special Account Number One was the same as a banking account, as explained by the bankrupt (App. 27); (2) Special Account Number Two was Kohlberg's money on which he had already paid taxes in order to avoid double taxation (App. 27, 28); (3) Special Account Number Three was set up to pay operating expenses of Kohlberg, such as to give away matches to prospective customers (App. 28). He had on hand at the trial cash receipts from the bankrupt's corporation totaling $67,864.58 from 1963 to 1967 (pl. ex. 1, App. 28). He had cancelled checks of $21,000.00 to the bankrupt's corporation, starting March 2, 1965 (pl. ex. 2, App. 29, 30). From 1967 to 1970 at the

suggestion of the bankrupt, he accrued bonuses in special accounts or deferred balance of money accounts (App. 31). The bankrupt gave Kohlberg a sheet marked "1967 Operation Taxpayer Bonus," showing how the bonus was calculated (pl. ex. 3, App. 31). There was introduced a non-negotiable check from the bankrupt's corporation dated April 6, 1967, of $3,400.00, payable to Kohlberg, representing a "1965 Operation Taxpayer Bonus," never signed by the bankrupt (pl ex. 4, App. 32). He was told after receiving this check to leave it in accounts receivable where it would draw interest, but the bankrupt failed to place it in the accounts receivable account (App. 33). Kohlberg testified that he trusted the company (App. 35). He was never told by the bankrupt that the special account funds had been

transferred on February 12, 1968, from his special account to Walker Realty Corporation Number Two (App. 37). A number of yellow cards were introduced as plaintiff's exhibit 5, from 3/13/63 through 2/12/68, representing monies Kohlberg had invested in the bankrupt's company (pl. ex. 5, pl. ex. 6, App. 33-35, App. 37, 38). A yellow ledger card, marked "Special Account Number Two," representing monies taken out of Kohlberg's checking account of funds on which he had paid taxes and bank certificates was transferred on May 1, 1967, (pl. ex. 7, App. 39), without his knowledge by the bankrupt. He did not receive a photostat of plaintiff's exhibit 6 until 1973 when the bankrupt's son, Jody Walker, made him a photostat (App. 40, pl. ex. 8). In 1967 the bankrupt told him to defer his

commissions to save taxes (App. 41, 42). In 1967 the bankrupt denied that his company was on the verge of bankruptcy, denied that he was in difficulty financially, saying he was backed by attorneys John James, Herbert Kramer, Mr. McGeein, and a financier named Mr. Gutterman (App. 43, 44). The bankrupt in 1967 represented that he owned a group of single residence lots in the Ocean View section of Norfolk, a large commercial lot on East Little Creek Road, giving the impression that the bankrupt owned considerable real estate and he relied on the bankrupt's representation (App. 45). There was introduced as plaintiff's exhibit 9 sheets entitled "Accrued Commissions - Kohlberg, Harry," representing deferred commissions from October 1967 through February 12, 1971 (pl. ex. 9, App. 45,

46). On February 12, 1971, the sum of $2,076.00 was transferred to his special account with the remainder of $64,174.84 transferred to accounts receivable, without Kohlberg's knowledge (App. 47). Sheets marked "Kohlberg, Harry - Special Account," from February 9, 1968 through March 25, 1971 were understood to be a savings account at the bankrupt's company and the entire amount of $40,489.00 was transferred on March 25, 1971, to accounts receivable number 246 (App. 48). On March 25, 1971, the bankrupt refused to permit Kohlberg to draw a thousand dollars per week as he had done in the past (App. 48). He was never told by the bankrupt of any transfer of Kohlberg's funds in the bankrupt's company (App. 49). A one-page sheet marked "Commissions Payable - Kohlberg, Harry" from November of 1966

through March 31, 1970, shows transfers to accrued accounts (pl. ex. 11, App. 49, 50). It was not until the fall of 1973 that the bankrupt's son turned over photostats of these special accounts (App. 50). Kohlberg left the bankrupt in September or October of 1973 (App. 50). Photostats of sheets marked "Commissions Paid - Kohlberg, Harry," represented commissions paid to him from 1966 through 1974 (pl. ex. 12, App. 50, 51). Sheets from March 25, 1966 through April 2, 1974 show accounts receivable owed to him by Walker of $149,484.20 (pl. ex. 13, App. 51, 52). The bankrupt did not give him credit of $12,185.13 that was transferred to Walker Realty Corporation card number 2, on the accounts marked Accounts Receivable (pl. ex. 6, App. 38, App. 52, 53). The sum of $109.32 was transferred

by Walker from Commissions Payable number 531, was not credited to Deferred Account (App. 53). He retired in June 1960 from the Navy after thirty years of service (App. 54). He stopped deferring commissions with the bankrupt in 1970 because of a ruling by the Internal Revenue Service that the deferral of commissions was not lawful (App. 54). After the 1970 ruling of the Internal Revenue Service, Kohlberg demanded payment of his accrued commissions, but bankrupt said he did not have the monies in 1970 (App. 55). Bankrupt said he would give the plaintiff a note for the amount owed (App. 55, 56). Prior thereto, the bankrupt had put him off by saying he was going to close on certain real estate (App. 56). The bankrupt stated that he would commence paying on the

amount owed to Kohlberg in April 1974 (App. 56). The bankrupt guaranteed a note of Joseph L. Walker Corporation, made one payment. Suit was filed in the Circuit Court of the City of Norfolk, which entered judgment in 1974 (App. 57). Kohlberg trusted the bankrupt and his comptroller Bob Mullins (App. 58). The plaintiff was naive, a bum businessman (App. 58).

On cross-examination, Kohlberg testified that he did not question the financial condition of the bankrupt because of the many closings that were pending (App. 61). He did not believe that there was any risk attached to placing his funds at 1 percent interest per month, did not know the company was in difficulty, relied upon the bankrupt's representation of his many backers, that he was doing a great business, and that

he owned considerable real estate (App. 63). The note guaranteed by the bankrupt was dated September 5, 1973 (App. 65). Kohlberg did not think that the bankrupt was in financial difficulty from 1966 to 1967 (App. 67). He first became aware that the cash flow of the company had deteriorated in 1970 (App. 68). He first became aware of financial difficulty of the bankrupt in 1970 after the Internal Revenue Service straightened out his returns (App. 75). Thereafter, he did not defer any commissions.

Joseph L. Walker, the bankrupt, called as an adverse witness, testified that he was the sole stockholder of Joseph L. Walker Realty Corporation (App. 85). He held a broker's license (App. 85). His corporation owned no real estate from 1963 to 1973 (App. 86).

His corporation was the sole stockholder of the Norwalk Corporation, the Walker Realty Trailer Company, and the Richo Corporation (App. 87, 88). His corporation owned stock in the Morse Realty Corporation (App. 88). His corporation was equal partner with Wellington Woods, Inc. in a partnership known as Walker Realty Company, which was organized in 1966 and continued existence to early 1975 (App. 89, 90). He transferred Kohlberg's money into Walker Realty Company (App. 90). He kept no separate bank accounts for Walker Realty Company and the Walker Corporation (App. 92). He personally never notified Kohlberg of any transfer of Kohlberg's funds (App. 93).

The witnesses offered by the bankrupt, to-wit: Lucille S. Miller, Clyde Thornton, Christopher Councill,

James P. McGeein, Bob Mullins, and the bankrupt himself did not say that the plaintiff knew of any financial difficulties experienced by the bankrupt from 1963 through 1970. For example, Lucille S. Miller, the bankrupt's girlfriend, first went to work on August 7, 1972 (App. 98). Clyde Thornton first learned that the bankrupt was in financial difficulty in the early part of 1973 (App. 107). Christopher Councill, a son-in-law of the bankrupt, stated that the bankrupt was in bad financial condition in early 1973 (App. 113). Mr. McGeein said that Kohlberg was aware of bankrupt's problems in September 1973 (App. 121). Bob Mullins, comptroller for the bankrupt from November 1959 through May 1972 (App. 127, 128), while stating that the bankrupt was in financial difficulty

continuously from 1959 to 1972, stated that he did not disclose to plaintiff the financial condition of the bankrupt because he did not feel that it was his duty to do so. (App. 138, 139, 147, 148, 150).

Kohlberg on rebuttal denied that he was told by either bankrupt or Mullins that the bankrupt was in bad shape financially (App. 174, 175). The bankrupt told him that everything was fine and not to believe rumors (App. 175). He was told by the bankrupt that there was no need for him to get statements of his funds because the company would not cheat him, the auditors checked the books every three months and would catch anything wrong (App. 175, 176). Kohlberg trusted the bankrupt (App. 176).

The opinion of the Court of Appeals for the Fourth Circuit reversed the

District Court on the ground that the Fourth Circuit believed that the Bankruptcy Court found that petitioner did not reasonably rely on the statements made by Walker, declining to consider the issue of whether the taking of the note in satisfaction of the debt should estop Kohlberg from preventing the discharge of the obligation. The last sentence of the opinion states that because the District Court did not test the Bankruptcy Court's findings under the proper standard but, instead, merely substituted its factual conclusions in their place, this judgment must be reversed.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals adopted an improper standard by reading into the Bankruptcy Judge's order of discharge words which the order does not express.

The Bankruptcy Judge did not find as a fact that petitioner did not reasonably rely on the statments made by Walker. The Fourth Circuit should have adopted the rule that the District Court is not bound by the conclusions and inferences which the Bankruptcy Judge draws therefrom. Its order of reversal of the District Court conflicts with cases from other circuits. It misconstrued the Bankruptcy Rule 810 as to the clearly erroneous rule set forth therein, identical to Bankruptcy Rule 752 (a). The following circuits, construing Bankruptcy Rules 810 and 752 (a) hold that when the facts are not in dispute, the reviewing court is not bound by the conclusions and inferences which the referee draws therefrom, that the District Court can freely draw differing inferences from undisputed facts, and

where the factual determination is primarily a matter of drawing inferences from undisputed facts, the clearly erroneous rule does not apply to questions of law or to mixed questions of fact and law, nor where the referee's error is one of law consisting of giving wrong legal significance to facts, nor to a finding dealing with the effect of certain transactions or events nor to a determination of legal consequences or undisputed acts: _In re Morasco_, 233 F. 2d 11 (C.A. 2d 1956); _Shaw_ v. _U. S. Rubber Co._, 361 F. 2d 679 (C.A. 5th 1966); _Stafos_ v. _Jarvis_, 477 F. 2d 369 (C.A. 10th 1973); _Solomon_ v. _Northwestern State Bank_, 327 F. 2d 720 (C.A. 8th 1964); _Minnick_ v. _Lafayette Loan & Trust Co._, 392 F. 2d 973 (C.A. 7th 1968); _Costello_ v. _Fazio_, 256 F. 2d 903 (C.A. 9th 1958); _Namoff_ v. _Hyland_

Elec. Supply Co., 275 F. 2d 14, certiorari denied 364 U.S. 818, 5 L. Ed. 2d 49 (C.A. 7th 1960).

A reading of the Bankruptcy Judges' order of discharge discloses that the order is grounded on the taking of a note guaranteed by Walker. The two authorities cited in the order of discharge do not apply.

In 1A Collier on Bankruptcy, Sec. 17.16 (6), p. 1650.1, it is said:

> "In the Bankruptcy Court, the issue is whether the debt is discharged or rendered nondischargeable by Sec. 17 a (2), an issue not presented in the prior state court action and not capable of being raised. The issues in the two actions are different. As to the facts raised in the state court action, the particular ones pertaining to Sec. 17 a (2) of the Bankruptcy Act were not necessary to the judgment obtained, and not even relevant thereto. They become relevant only on the issue of dischargeability of the debt in bankruptcy and have no bearing on whether or not one is indebted "to another. In such a case the authorities are in accord that the doctrine of collateral estoppel does not apply to bar the Bankruptcy Court from contesting those facts in the subsequent trial in the Bankruptcy Court."

In Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va. 1967), it was held that a creditor who claimed that its debt was not discharged by the debtor's discharge in bankruptcy, did not affect the dischargeability of debt by reducing it to judgment in a state court.

In accord are the following authorities:

National Homes Corp. v. Lester Industries, Inc., 336 F. Supp. 644 (D.C. Va. 1972);

Hisey v. Lewis-Gale Hospital, 27 F. Supp. 20 (W.D. Va. 1939);

Arnold v. Employers' Insurance of Wausau, 465 F. 2d 354 (10th Cir. 1972);

Fidelity & Casualty Co. of New York v. Golombosky, 133 Conn. 317, 50 A. 2d 817;

Levin v. Singer, 227 Md. 45, 175 A. 2d 423 (1961);

American Surety Co. v. McKiernan, 304 Mich. 322, 8 NW 2d 82 (1943);

Gregory v. Williams, 106 Kan. 819, 189 P. 932 (1920);

Guernsey-Newton Co. v. Napier, 151 Wash. 318, 275 P. 724 (1929);

United States Credit Bureau v. Manning, 147 C.A. 2d 558, 305 P. 2d 970 (1957);

Gehlen v. Patterson, 83 N.H. 328, 141 A. 914 (1928);

8 Remington on Bankruptcy, Sec. 3325, 3871;

9 Am. Jur. 2d Bankruptcy, Sec. 821, p. 616;

Fierman v. Lazarus, 361 F. Supp. 477 (E.D. Pa. 1973) aff'd 493 F. 2d 1400 (3d Cir. 1973);

Matter of Pigge, 539 F. 2d 369 (C.A. 4th 1976).

Walker concealed from Kohlberg his financial difficulties of which Kohlberg first learned in 1970 when Internal Revenue Service ruled that he could not defer his commissions, at

which time he stopped deferring same.

The evidence recited in this petition clearly shows that Kohlberg did not know of the financial difficulties of the bankrupt until 1970, at which time he promptly stopped deferring his commissions. In 1967 when he first deferred his commissions, he was told by the bankrupt that the bonus check payable to him, not signed by the bankrupt, was to be placed in a special account drawing interest. This was not done by the bankrupt and was never disclosed to Kohlberg.

II. The denial by the Bankruptcy Court in entering its order of April 19, 1976 of the petitioner's motion to amend the complaint under Section 17 (a) (4) of the Bankruptcy Act that Walker created debts by his fraud, embezzlement, misappropriation, or defalcation

of funds due petitioner while the bankrupt was acting as officer in a fiduciary capacity conflicts with Bankruptcy Rule 715, Federal Rule of Civil Procedure 15 (a), (b), (c). The sole basis of the order denying the proposed amendment was that it should have been filed prior to March 3, 1976, which was the last day for filing complaints to determine the discharge-ability of debts.

Bankruptcy Rule 715 states that Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceed-ings. Rule 15 (a) states that leave to amend pleadings shall be freely given when justice so requires. Rule 15 (b) permits amendment of pleadings at the trial on the ground that evidence is not within the issues made by the pleadings and that amendment shall be

made freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the omission of such evidence would prejudice him in maintaining his defense upon the merits, with permission given by the court to grant a continuance to enable the objecting party to meet such evidence. Rule 15 (c) states that when the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

In 6 Wright and Miller, Federal Practice and Procedure, Sec. 1472, p. 361, it is said that Bankruptcy courts usually have been very liberal when

allowing amendments to pleadings.

In the case of Charles Edward & Associates v. England, 301 F. 2d 572 (9th Cir. 1962), the court held that amendment of bankruptcy specifications should have been granted in accordance with liberal spirit of the applicable Federal Rules of Civil Procedure.

In the case of In re Sturdevant, 415 F. 2d 465 (5th Cir. 1969), a bank was allowed to file amended specifications of objections to discharge but within the time allowed by the referee's order.

The complaint was timely filed within the date fixed by the Bankruptcy Judge's order. The amendment was another allegation of fraud by the bankrupt. Under federal law, the fraud of Joseph L. Walker Realty Corporation, where the bankrupt is sole stockholder,

is chargeable to him. The bankrupt was a fiduciary. Hamby v. St. Paul Mercury Idem. Co., 217 F. 2d 78 (C.A. 4); Bloemecke v. Applegate, 271 F. 595 (C.A. N.J. 1920); In re Kunkle, 40 F. 2d 563 (D.C. Mich. 1930); Kadish v. PHX-Scotts Sports Co., 11 Ariz. App. 575, 466 P. 2d 794; 8 Remington on Bankruptcy, Sec. 3362, Sec. 3363, Sec. 3368, Sec. 3871.

CONCLUSION

1. The Bankruptcy Judge found Walker to be guilty of fraud towards petitioner. Kohlberg left with Walker his savings as well as commissions he had earned. The estoppel concluded by the Bankruptcy Judge is not supported by the evidence and does not represent a factual finding within the clearly erroneous rule.

2. The Bankruptcy Judge heard and

denied the motion to amend the complaint to include a count under Clause (4), Section 17 of the Bankruptcy Act. The evidence supported such a clause and under 15 (c) of the Federal Rules of Civil Procedure, it would relate back to the timely filing of the complaint under Clause (2) of the Federal Rules of Civil Procedure. On review to the District Court from the Bankruptcy Court, petitioner listed as an issue on appeal the denial of the motion to amend, as well as in his brief to the Fourth Circuit. The opinion of the Fourth Circuit, as well as the opinion of the District Judge, do not discuss this issue.

3. The petition for certiorari should be granted.

Respectfully submitted,

HOWARD I. LEGUM
Counsel for Harry Kohlberg

Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3(b), I certify that service was made on respondent Joseph Lynn Walker, by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed Archie L. Boswell, Virginia National Bank Bldg., P.O. Box 3312, Norfolk, Virginia, 23514, this 3rd day of January, 1979.

HOWARD I. LEGUM
Attorney for Petitioner, a member of the bar for the Supreme Court of the United States

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 77-1308

In re:

Joseph Lynn Walker   Bankrupt,

Harry Kohlberg,   Appellee,

v.

Joseph Lynn Walker,   Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

William K. Slate, II
Clerk

Filed
Oct 19 1978
William K. Slate, II
Clerk

PER CURIAM:

This is an appeal from a decision of the district court reversing a decision of the bankruptcy court in which that court granted the bankrupt Walker discharge of a debt owed Kohlberg. Because we believe the district court did not adhere to the proper standard of review of bankruptcy court findings of fact, that the findings will not be distrubed unless clearly erroneous, we reverse.

The case arises from the dealings involving Walker Realty Company and Harry Kohlberg, its salesman. Kohlberg was induced to invest money in Walker Realty at one percent a month interest and to defer commissions and bonuses. This sum of monies, accumulated between 1967 and 1973, are the source of contention. In 1973, Walker endorsed a

note in the amount of $150,000 to Kohlberg from Walker Realty in satisfaction of the debt.

After Walker filed his petition in bankruptcy on February 20, 1976, Kohlberg objected under § 17 (a) (2) of the bankruptcy act, 11 U.S.C. §35 (a) (2), to the dischargeability of the debt, claiming that ". . . Walker, bankrupt, obtained from . . . Kohlberg the sum of $148,900 from 1967-1973 as a result of oral representations made to . . . [Kohlberg] that . . . [Walker] was solvent and that . . . [Walker] had funds to repay . . . [Kohlberg], with interest, on demand;" that Walker "knew during said period of time that he was not solvent and that he did not have funds to pay . . . [Kohlberg], with interest, on demand;" that Walker "intended to induce Kohlberg to advance

the money on the basis of the representation;" that Walker "obtained money from . . . [Kohlberg] by means of pretenses and false representations; that "said false pretenses and representations were made with an intent to induce . . . [Kohlberg] to advance funds to Walker." The bankruptcy court, after expressing criticism of Walker's practices, found that Kohlberg was estopped from preventing discharge of the debt because (1) having "positive knowledge of the bankrupt's financial difficulties as early as 1967," he "rode along as a willing sucker;" and (2) the taking of a note in satisfaction of the debt estopped recovery.

The district court, in reversing the decision of the bankruptcy judge, held that the acceptance of a note in satisfaction of a debt does not operate

as an estoppel to setting up the fraud which induced the orignal debt in an attempt to avoid discharge of that debt and that Kohlberg's knowledge of the bankrupt's financial conditions did not prevent his reliance on the bankrupt's representations.

Because we believe that the bankruptcy court found that Kohlberg did not reasonably rely on the statements made by Walker, we do not have to consider the issue of whether the taking of the note in satisfaction of the debt should estop Kohlberg from preventing the discharge of the obligation.

When a bankruptcy judge makes a finding of fact, that determination stands, on appeal to the district court, on much the same footing as a finding of fact by a district court on appeal from that court to a court of appeals.

The finding will not be disturbed unless "clearly erroneous." Bankruptcy Rule 752. Rule 752 is an adaptation of FRCP 52 and we think should be construed the same as FRCP 52. See Advisory Committee's note to Rule 752 found at p. 120 of U.S.C.A.

Here, the bankruptcy court found that "Kohlberg had positive knowledge of the financial difficulties certainly as early as 1967; nevertheless, he agreed at that time to a deferment of his commission payments. He rode along as a willing sucker." Yet the district court decided that "Kohlberg's knowledge of the financial problems of Walker did not . . . make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which . . . were relied on by Kohlberg."

We feel that this part of the district court's decision failed to give proper deference to the requirements of Bankruptcy Rule 752. The bankruptcy court's factual determination that Kohlberg was a willing sucker who had "positive knowledge of the financial difficulties" conflicts, we believe, with the district court's finding that Kohlberg reasonably relied on Walker's representations.

In order to prove that his debt is non-dischargeable under § 17 (a) (2), Kohlberg must prove that he reasonably relied on the representations made by Walker. Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va. 1967). Although it might be said that an innocent sucker might reasonably rely on statements, we do not believe that

a "willing sucker" who "rode along" while having "positive knowledge" of the debtor's financial difficulties can be said to have exercised reasonable reliance.

We are therefore of opinion the district court's factual finding of reliance conflicts with the factual determinations made by the bankruptcy court. Because the district court did not test the bankruptcy court's findings under the proper standard but, instead, merely substituted its factual conclusions in their place, its judgment must be reversed.

REVERSED.

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

In re

JOSEPH LYNN WALKER,
Bankrupt

HARRY KOHLBERG,

Appellant

v. Bankruptcy No. 75-1555-N

JOSEPH LYNN WALKER,

Appellee

MEMORANDUM ORDER

This is an appeal from an order of the Bankruptcy Judge that the debt of the bankrupt Walker to the appellant Kohlberg be discharged.

In his complaint Kohlberg had sought to have the amount owed to him (he alleges $143,842.73) saved from the bankrupt's discharge on the ground that

the funds were obtained by false pretenses and representations.

The Bankruptcy Judge found that the bankrupt's conduct toward his sales agent Kohlberg was indeed reprehensible, but that Kohlberg was estopped from raising the exception to discharge contained in the Bankruptcy Act § 17 (a) (2), 11 U.S.C.A. 35 (a) (2).

Judge Bonney based his holding on two fact findings: (1) that Kohlberg knew as early as 1967 that Walker was in financial trouble, and (2) that, in 1973, Kohlberg asked for and accepted a note in satisfaction of his claim. Although these two fact findings are supported by substantial evidence, we do not believe they justify the conclusion that Kohlberg is estopped.

The better authority holds that the taking of a note, with respect to a

liability for fraud, even at a time when the creditor knows of the fraud, is <u>not</u> an estoppel to setting up Section 17 (a) (2) of the Bankruptcy Act in avoidance of a discharge. <u>See</u> authorities collected in 145 ALR 1238. Of like authority is 8 Remington on Bankruptcy § 3325 (6th Edition, 1976 Supplement), Page 187 which states:

> "The taking of a note with respect to liability for fraud is not an estoppel to setting up the fraud in avoidance of a plea of discharge in an action on the note."

1A Collier on Bankruptcy, § 17.16[2] is relevant not to the issue of estoppel, but rather to the issue of what constitutes "money or property."

Section 17 (a) (2) of the Bankruptcy Act reads, in pertinent part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities for obtaining

"money or property by false pretenses or representations."

For the debt owed to Kohlberg to have been rendered non-dischargeable under this section, he had to prove actual fraud, or more specifically:

(1) that money or property was obtained by false pretenses or representations;

(2) that the bankrupt had thereby engaged in moral turpitude or an intentional wrong;

(3) that the representations were knowingly and fraudulently made;

(4) that the representations were reasonably relied upon by Kohlberg.

1A Collier, § 17.16, at 1633 et seq; Sweet v. Ritter Finance Co., 263 F. Supp. 540, 543 (W.D. Va. 1967).

An examination of the testimony indicates that Kohlberg met his burden. Looking beyond the estoppel, which we

find inapplicable here, Kohlberg's knowledge of the financial problems of Walker did not, in our judgment, make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which, we find, were relied on by Kohlberg.

The action of the Bankruptcy Judge in finding that the Walker debt to Kohlberg in the amount of $143,842.73 was discharged, is REVERSED, and the discharge, as to this debt, is DENIED.

U. S. District Judge

Norfolk, Virginia

December 22, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

In re

JOSEPH LYNN WALKER,

Bankrupt

HARRY KOHLBERG,

Plaintiff

v. Bankruptcy No. 75-1555-N

JOSEPH LYNN WALKER,

Defendant

ORDER OF DISCHARGE

This is the case of the unfaithful master and the loyal servant.

The conduct of Joseph Lynn Walker, the bankrupt here; Joseph L. Walker Realty Corp.; and Walker Realty Co., in their relationship with Harry Kohlberg, the plaintiff, is clearly reprehensible.

The value of Kohlberg to the Walker organization from 1963 - 1973 is

indisputable as he for several years averaged $2,500,000 in realty sales, reaching a peak year of $3,870,000. Obviously, Kohlberg's commissions on such a volume were huge, averaging $75,000 annually and on an occasion exceeding $100,000. He was a salesman devoutly to be wished.

When Walker offered to pay interest at the rate of 1% per month on funds Kohlberg would place in a "savings account" with the firm, Kohlberg in 1963 began what he at times referred to in his testimony as to "invest," first channeling proceeds from the sale of a family residence into the account. He continued this until 1967. From this account Kohlberg had no difficulty withdrawing funds for such purposes as purchasing a new automobile until 1967 when doing so became a problem and even

impossible. Further, Walker suggested that Kohlberg defer receiving his commission payments until some future but indefinite time. This was agreed to and effected.

Thereafter, and from time to time, Kohlberg made demand for his deferred commissions but was unable to obtain any. Finally, Kohlberg suggested a note to cover the amount due him and by instrument dated September 5, 1973, this was accomplished on paper in the amount of $150,000, made by Joseph L. Walker Realty Corporation, by its President, Joseph L. Walker, and personally endorsed by Joseph L. Walker. [a part of defendant's exhibit #1] But a single payment was made on the note.

By his complaint for the determination of the dischargeability of the debt, Kohlberg seeks to have the

amount owing him, $148,900.00, saved from the bankrupt's discharge alleging the bankrupt obtained the funds by false pretenses and false representations.

The Court finds the Walker organization's modus operandi a deceptive one, a system of taking from Peter to pay Paul, of existing on expectations for a better tomorrow and of tactics to camouflage its inability to meet its obligations to Kohlberg.

With office account cards lost and thrown out - Kohlberg was able to salvage some - Walker cannot completely explain the organization's financial picture. Further, a most peculiar system of accounting existed. A witness, Lucille S. Miller, Walker's secretary and secretary of the corporation, testified she never knew the difference between the Walker

Corporation and the Walker Company. At a sales meeting held on or about April 6, 1967, Walker presented a commissions bonus check in the amount of $3,430.25 to Kohlberg; however, the check was unsigned - Walker did not have the funds - and it was used ostentatiously before the other salesmen as a carrot on a stick. The best testimony is that the organization was in constant financial dificulty. One employee testified the business was in trouble when he came in 1959 and was still in trouble in 1972 when he left. Even the maintenance man left in 1973 after thirteen years service to find more secure employment.

Indeed, there unfolds the picture of a business somewhat of the strain of the Brown empire where the Court found a course of dealing in expectations

sufficient grounds for denial of the bankrupt's entire discharge. In re William Angus Brown, Bankruptcy No. 75-365-N. The rule too simply stated in English is that issuing from In re James, 181 F. 476 (4th Cir. 1910), app. den. 227 U.S. 410:

> "A bankrupt, in order to be entitled to a discharge, must come into court with clean hands, and show that his conduct has been that of an honest, upright man."

The Walker organization's system of taking another's money, smiling about the good times, yet being unable, knowingly, to meet the obligations to Kohlberg, is out and out the dirty hands doctrine which clearly endangers one's discharge in bankruptcy.

The renown, classic case on the subject of false pretenses and false representations is Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va.

1967). See Hartford Accident & Indemnity Co. v. Flanagan, 28 F. Supp. 415 (D. Ohio 1939), which states, "Public policy forbids the discharge of a bankrupt from debts incurred through fraud while acting as an officer [of a corporation] or in a fiduciary capacity . . ."

Ah, but woe! As reprehensible as was defendant's conduct, Kohlberg by the doctrine of estoppel is denied the relief sued for.

Kohlberg had positive knowledge of the financial difficulties certainly as early as 1967; nevertheless, he agreed at that time to a deferment of his commission payments. He rode along as a willing sucker. [Definition 6, Webster's Third New International Dictionary] In 1973 he asked for and accepted a note in satisfaction of his

claim. The acceptance of a note in satisfaction of money previously obtained by a bankrupt even if obtained by fraud, is not within the meaning of the exception to discharge contained in Section 17 a (2), 11 U.S.C. 35 (a) (2). By such acceptance one is estopped. 8 Remington on Bankruptcy, Section 3325; 1A Collier on Bankruptcy, Section 17.16 [2].

It appearing to the Court, according to the evidence and the law, that the specifications set forth in said complaint have not been sustained, it is, therefore,

ORDERED that said debt be, and it hereby is, discharged in bankruptcy in accordance with the provisions of Section 17 of the Bankruptcy Act, 11 U.S.C. 35.

It is furthermore ORDERED that the plaintiff whose debt is discharged by

this order is enjoined from instituting or continuing any action or employing any process to collect such debt as a personal liability of the bankrupt.

The clerk will forward a copy of this order to the attorney for the plaintiff, the attorney for the defendant, and the trustee.

HAL J. BONNEY, JR.
U. S. Bankruptcy Judge

Norfolk, Virginia

June 3, 1976

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

In re

JOSEPH LYNN WALKER,
Bankrupt

Bankruptcy No. 75-1555-N

HARRY KOHLBERG,

Plaintiff

v.

JOSEPH LYNN WALKER,

Defendant

ORDER DENYING LEAVE TO AMEND COMPLAINT

Upon the motion of the plaintiff, Harry Kohlberg, for leave to file an amendment to his Complaint pending herein, this cause came on to be heard on the 13th day of April, 1976, the plaintiff, Harry Kohlberg, being represented by his attorney, Howard I.

Legum, and the defendant bankrupt, Joseph Lynn Walker, being represented by his attorney, Archie L. Boswell;

It appearing to the Court that an Order was entered by this Court on the 15th day of December, 1975 fixing March 3, 1976 as the last day for filing complaints as provided in § 17 c (2) of the Bankruptcy Act to determine the dischargeability of debts claimed to be nondischargeable under clauses (2), (4), or (8) of § 17 a (2) of the Bankruptcy Act, and the said Harry Kohlberg further, on April 5, 1976, filed a Motion for leave to amend his complaint to include an objection to dischargeability under § 17 c (4) of the Bankruptcy Act;

It further appearing to the Court that the filing of such an amendment is governed by the provisions of § 17 c of

the Bankruptcy Act, and Rule 409 of the Rules of Bankruptcy Procedure, that the limitations specified by the Court by the Order of December 15, 1975 pursuant to the said Section, and the said Rule, are much like the limitation of a statute of limitations, and that after the passing of the last day for so filing such complaints the plaintiff may not bring in a new ground of objection to dischargeability by amendment, and the Court is accordingly of opinion that the request for leave to amend is not timely filed; it is accordingly

ORDERED, that the Motion of the plaintiff, Harry Kohlberg, filed on April 5, 1976, for leave to amend his complaint, be, and it hereby is, over-ruled, denied, and disallowed, to all of which the said plaintiff,

Harry Kohlberg, by counsel, objects and excepts.

Entered at Norfolk, Virginia, this the 19th day of April, 1976.

U.S. Bankruptcy Judge

I ASK FOR THIS:

Attorney for Joseph
Lynn Walker

SEEN, OBJECTED and EXCEPTED TO:

Attorney for Harry Kohlberg

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1070

HARRY KOHLBERG,
Petitioner,

v.

JOSEPH LYNN WALKER
Respondent.

BRIEF OF RESPONDENT

OPPOSING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1070

HARRY KOHLBERG,

Petitioner

v.

JOSEPH LYNN WALKER,

Respondent

BRIEF OF RESPONDENT

OPPOSING WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Respondent, Joseph Lynn Walker, prays that this Court not issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit and respectfully submits his reasons in opposition thereto.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, the opinion of the United States District Court for the Eastern District of Virginia, and the opinion of the United States Bankruptcy Judge at Norfolk, Virginia are printed in Petitioner's petition at pages 48, 55 and 60 respectively.

None of those opinions are published.

QUESTIONS PRESENTED FOR REVIEW

The questions for review are as stated in the Petition for Certiorari at pages 3 and 4.

STATEMENT OF THE CASE

This case involves a discharge in bankruptcy granted to the Respondent Walker by the Bankruptcy Judge on June 3, 1976, on a voluntary petition of individual bankruptcy filed by Walker

on December 3, 1975.

After 30 years of service as a naval officer, Kohlberg retired from the U.S. Navy in 1963 and joined the Joseph L. Walker Realty Corporation as a real estate salesman. He soon became the star salesman for the Walker Company, selling millions of dollars worth of real estate and earning thousands of dollars of commissions and bonuses. (App. 23-25).

In 1966, Joseph L. Walker Realty Corporation formed a partnership with Wellington Woods, Inc., and the said partnership traded as Walker Realty Company until approximately the time of Walker's bankruptcy. (App. 89).

Accordingly to the testimony of the Petitioner, the Walker Realty Company was doing a tremendous business, with many closings pending, but it had substantial cash flow problems and such problems continued throughout Kohlberg's employ-

ment and of these problems he was aware. (App. 60 and 61, 68, and 134).

Beginning in 1963, Kohlberg invested or deposited certain of his individual funds in the corporation. He received interest thereon at 1% per month. There was no allegation of any false pretenses or representations in connection with funds so deposited during these early years.

The company was slow in meeting payrolls and commissions, and at or about April 6, 1967, the Petitioner, at a sales meeting was presented with an unsigned bonus check marked "non-negotiable" in the amount of $3,430.25 and then informed privately that the company did not have the funds at that time to cover the check. (App. 32 and 33).

In 1967, prior to November 6, 1967, certain discussions took place between Kohlberg, Walker, and other representa-

tives of the company about the deferral of the payment of commissions to salesmen as a tax deferral device. (App. 41, 42 & 43).

Kohlberg consulted his attorney as to the tax aspect of the deferral of commissions and the sufficiency of certain real estate and business ventures as collateral and gave instruction in writing that the payment of his commissions be deferred. A copy of the Kohlberg letter of November 8, 1967, to this effect (Defendant's Exhibit 4) is reproduced hereafter, at page 35.

On cross-examination concerning this letter, which referred to Owen Pickett as his lawyer, Kohlberg responded varyingly as follows: "that he had not had an attorney--that he hadn't consulted an attorney--that someone else was his attorney--that the memo was in fact signed by him--that he didn't recall

it--that he made a phone call and got a kind of answer--that Pickett wasn't really his attorney, and that he didn't charge me for the advice." (App. 80 and 81).

Kohlberg deferred the receipt of certain of his commissions from 1967 thru 1970 and then terminated the arrangement after difficulty with the Internal Revenue Service. (App. 54).

Petitioner sets forth, at pages 20 et seq., short portions of out of context testimony of Kohlberg and others with respect to the transfer of funds among accounts and related matters. The Bankruptcy Judge heard and evaluated all of this together with the remainder of the evidence prior to his ruling.

Respondent summarized all of such matters in his brief to the Circuit Court as follows:

By way of summary of the accounts: claimant's investments of noncommission money went into the Corporation Special Kohlberg Accounts 1 and 2, Plaintiff's Exhibit's 5 and 6, 7 and 8 respectively. After the partnership was formed, the balances were transferred to the Partnership Kohlberg Special Account (Plaintiff's Exhibit 10) and ultimately to Kohlberg's consolidated AR Kohlberg Account #246 (Plaintiff's Exhibit 13).

Claimant's deferred commissions were recorded in his Accrued Commissions Account during the time commissions were deferred, 1967-1970, and then transferred to his consolidated AR Kohlberg Account #246 (Plaintiff's Exhibit 13). All the Kohlberg claims were transferred to Plaintiff's Exhibit 13 and it was from that account that the balance for the note of September 5, 1973 was determined (App. 51), after the claimant had received and reviewed copies of the records of his transactions.

Plaintiff's Exhibit 11 was an account of certain commissions which were payable to him, which were transferred to his deferred commissions (Plaintiff's Exhibit #9) and Plaintiff's Exhibit 12 was a listing of commissions paid to claimant Kohlberg over the period covered which was furnished to him for use in connection with the preparation of his income tax

returns.

By letter in April, 1973, Kohlberg demanded that his accounts receivable be brought up to date, and that since he would no longer be with the company, he wanted a note signed by all the owners of Walker Realty Company and each signature witnessed and notarized. (II App. 11).

After further negotiations a note in the amount of $150,000.00, payable to Kohlberg was issued by the Joseph L. Walker Realty Company and individually endorsed by Respondent Walker. (App. 51).

The bankruptcy petition of Respondent Walker was filed on December 3, 1975. Pursuant to § 17c(2) of the Bankruptcy Act, the Court entered its order setting March 3, 1976 as the last day for the filing of objections to the dischargeability of a debt under clauses

(2), (4) or (8) of §17a of the Act.

On February 20, 1976, Kohlberg filed a complaint alleging nondischargeability of a debt to him under §17a(2) as follows:

> 1. Joseph Lynn Walker, bankrupt, obtained from Plaintiff Harry Kohlberg the sum of $148,900.00 from 1967-1973 as a result of oral representations made to Plaintiff that Defendant was solvent and that Defendant had funds to repay Plaintiff, with interest, on demand.
>
> 2. Defendant knew during said period of time that he was not solvent and that he did not have funds to repay Plaintiff, with interest, on demand. Defendant intended to induce Plaintiff to advance the money on the basis of the representation.
>
> 3. Defendant obtained money from Plaintiff by means of the pretenses and false pretenses.
>
> 4. Said false pretenses and representations were made with an intent to induce Plaintiff to advance funds to Defendant in the sum of $148,900.00.

The complaint was duly answered and set for hearing.

On April 5, 1976, Kohlberg filed a motion for leave to amend complaint, which proposed amendment read as follows:

> Defendant bankrupt created debts by his fraud, embezzlement, misappropriation, or defalcation of funds due the plaintiff while the bankrupt was acting as an officer or in a fiduciary capacity.

The Bankruptcy Judge refused the amendment as is more particularly discussed under Issue II herein, pages 26 to 31, and a discharge was entered after a lengthy hearing on the merits.

On appeal to the District Court, the order of discharge was reversed, and the Fourth Circuit Court of Appeals reversed the District Court and reinstated the discharge, from which Petitioner now seeks certiorari. The orders of the Bankruptcy Judge, the District Court, and the Circuit Court are reprinted in Kohlberg's petition at pages 60, 55 and 48, respectively.

ARGUMENT

I

Petitioner's first question for review presents a question expressly not decided or considered by the Fourth Circuit Court and is as follows:

> I. Where the Bankruptcy Judge ruled that petitioner was not entitled to relief because of estoppel by asking for and accepting a promissory note for the amount of his claim and cited two authorities which were not relevant, and the United States District Court reversed the Bankruptcy Judge and held that petitioner's judgment was not dischargeable in bankruptcy, did the Court of Appeals err in holding that Bankruptcy Rule 810 required the District Court to accept the referee's findings of fact unless they are clearly erroneous, since the Bankruptcy Judge's holding of estoppel, was a conclusion and inference from facts not in dispute?

The Fourth Circuit Court of Appeals stated:

> Because we believe that the bankruptcy court found that Kohlberg did not reasonably rely on the statements made by Walker, we do not have to consider the

issue of whether the taking of the note in satisfaction of the debt should estop Kohlberg from preventing the discharge of the obligation. (Petition for certiorari, at 51).

Thus, Petitioner's question I is entirely insufficient as a basis for certiorari.

The Circuit Court specifically did not reach or make any determination as to the effect of the acceptance of a promissory note and based its decision on the finding of lack of reasonable reliance. The two authorities referred to in Petitioner's Issue I as being "not relevant" refer to the acceptance of a note which was the issue not decided by the Circuit Court.

It is a firmly established rule that a review on writ of certiorari will be granted only where there are special and important reasons therefor. Sup. Ct. R. 19(1); 16 Federal Practice and Procedure,

Jurisdiction §4004, (Wright, Miller, et als. 1977), note 17 (Court of Appeals are divided on the question, Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 404 (1976); Because of the obvious importance of the question, U.S. v. Janis, 428 U.S. 433 (1976); To address the important issues raised, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976); To resolve the important constitutional question, Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976).

Supreme Court Rule 19 indicates the character of reasons which will be considered, and it is respectfully submitted that the basis for certiorari jurisdiction maintained by Petitioner herein is not within those set forth in Rule 19, or the decisions of this Court, and has a marked lack of overall, national importance.

The bankruptcy court found that Kohlberg was estopped from preventing discharge of the debt because having "positive knowledge of the (bankrupt's) financial difficulties certainly as early as 1967, (he) nevertheless, agreed at that time to a deferment of his commission payments. He rode along as a willing sucker." (Petition for certiorari, at 66). The District Court affirmed these "fact findings" and further stated that they were "supported by substantial evidence", (Petition for certiorari, at 56), but went on to reverse the bankruptcy court on other grounds. (Petition for certiorari, at 59). The Court of Appeals reversed the District Court, holding that the District Court did not adhere to the proper standard of review of the bankruptcy court's aforesaid findings of fact. (Petition for certiorari, at 48). The aforesaid findings

are not inferences drawn by the bankruptcy court from facts not in dispute.

The case at bar is not one where the facts are "not in dispute" as assumed by Petitioner at page 34 of his petition. Kohlberg vehemently denied on direct examination that he had any knowledge about the financial difficulties. This testimony was outweighed, in the opinion of the Bankruptcy Judge, by Kohlberg's admissions on cross-examination, the testimony of other witnesses which contradicted his, and the documentary evidence. (See, Statement of Case herein).

As held by the Fourth Circuit, the determination of a Bankruptcy Judge, on appeal to a District Court, stands in much the same footing as a finding of fact by a District Court on an appeal from that Court to a Court of Appeals and is not to be disturbed unless "clearly erroneous". This principle is

fundamentally based on the time honored principle of American jurisprudence that great weight is to be given the determination by the trier of the facts, (here the Bankruptcy Judge), who saw and heard the witnesses, observed their demeanor and the intonations of their voices, and is thereby better able to make findings of fact than an appellant court reviewing a cold record. Bankruptcy Procedure Rules 810, 752(a); In re Entertainment, Inc., 375 F. Supp. 390 (E.D. Va 1974); In re Romero, 535 F.2d 618 (10th Cir. 1976). See also, FRCP 52 from which Rule 752 is an adaptation and should be construed accordingly; see Advisory Committee's note to Rule 752 at page 120, U.S.C.A.

On the basis of the foregoing, one or more of the indispensable elements to support a finding of nondischargeability of a debt under §17a(2) of the Act was

missing, certainly the element of reasonable reliance.

Reasonable reliance on false statements or representations is an essential requirement to prove, by the requisite clear and convincing evidence, nondischargeability under §17a(2). 1A Collier on Bankruptcy, Section 17.6, page 1634 et seq. Sweet v. Ritter Finance Co., 263 F. Supp. 540, 543 (W.D. Va 1967). In re Dolnick, 374 F. Supp. 84, 90 (N.D. Ill. 1974); In re Dye, 330 F. Supp. 895 (W.D. la. 1971), aff'd In re Humphries, 469 F. 2d 643, 644 (5th Cir. 1972); Bazemore v. Stehling, 396 F. 2d 701 (5th Cir. 1968); Greenfield State Bank v. Copeland, 330 F. 2d 767 (9th Cir. 1964); First Credit Corp. v. Behrend, 172 N.W. 2d 668 (1970); Sun Finance v. Cononico, 177 N.E. 2d 84 (1959).

Petitioner's brief, beginning at page 35, cites a number of cases for the proposition that "where the factual determination is primarily a matter of drawing inferences from undisputed facts, the clearly erroneous rule does not apply".

It should be noted, however, from Petitioner's first case, In re Morasco 233 F.2d 11, (2nd Cir. 1956) (which involves determination of law as to whether a conditional sale was not legally effective,)that the Circuit Court is equally free to draw its own inferences. After stating the "clearly erroneous" rule, the court stated:

> But where credibility of witnesses is not involved and the facts are undisputed, the District Judge and the Court of Appeals can more freely draw differing inferences from the undisputed facts. (In re Morasco, at 15).

In the case at bar, credibility was

very much involved and the facts were far from undisputed; accordingly, the Morasco case is inapplicable.

Moreover, even if the case at bar had been one of undisputed facts, the freedom of the Circuit Court to differ with and reverse the District Court (as it did and which Petitioner now challenges) is the true rule enunciated by the Morasco case.

In Shaw v. U.S. Rubber Co., Navgatuck Chemical Div., 679 F. 2d 679 (5th Cir. 1966), the question turned on whether or not the alleged recipient of a preference was chargeable with notice of insolvency because he would have known of same had he made inquiries, a question largely of law, and very different from the issues of the case at bar.

In Stafos v. Jarvis, 477 F. 2d 369 (10th Cir. 1973), the Circuit Court "specifically (concurred) with the

findings of the Referee and the Trial Court" relating to the recommendation of the trustee as to the extent of the bankrupt's claimed homestead exemption. It is submitted that this case is distinguishable on its face with the case at bar.

In the case of Solomon v. Northwestern State Bank, 327 F.2d 720 (8th Cir. 1964), the error of the Referee was one of law, involving the interpretation of the law of the State of Minnesota, relating to a factor's lien agreement. The Court, at page 724, specifically stated:

> There is much authority to the effect that ordinarily, when a Referee in Bankruptcy has made findings of fact and the Referee has actually heard the evidence, great weight is attached to his conclusions, and they will not be disturbed unless clearly erroneous. (citations omitted) In the present case, however, the Referee's error was one of law in that he gave the wrong legal significance to the facts.

In Minnick v. Lafayette Loan and Trust Co., 392 F.2d 973 (7th Cir. 1968), the Referee denied a discharge and the District Court affirmed that denial. The Circuit Court found that there was not sufficient evidence to support the denial of a discharge and ordered same granted. It is paramount to note that in this case cited by Petitioner, the Seventh Circuit confirmed the clearly erroneous standard by holding that one of the findings of the referee

> must be set aside as being without support in the record, and if in its entirety it be a finding of fact then it is clearly erroneous. In our judgment, a clear mistake has been made. (Minnick, at 976).

This case is authority for the Circuit Court to apply the clearly erroneous test and not for the proposition petitioner asserts.

The same is true in the case of Costello v. Fazio, 256 F.2d 903 (9th Cir. 1958). The Circuit Court disagreed with both the Referee and the District Court on the question of the legal effect of dealings involving notes between the bankrupt and its stockholders and officers.

In the case of Namoff v. Hyland Electrical Supply Co., 275 F.2d 14 (7th Cir. 1960), the Referee concluded that the Namoff brothers were not in partnership. The District Court found that such conclusions and the other findings of the Referee were clearly erroneous and held there was a partnership. The Circuit Court stated that it took the same view of the facts as did the District Court and affirmed that Court's setting aside of the conclusions of the Referee.

In the case at bar, the situation is markedly different. The District Court did not find the Bankruptcy Judge's fact findings to be clearly erroneous; in fact, it specifically found they "are supported by substantial evidence" (Petition for Certiorari, at 56) then reversed on other grounds. The Circuit Court rejected the approach of the District Court and affirmed the findings of the Bankruptcy Court.

It is submitted that the purport of these cases is that when disputed facts are involved, as in the case at bar, the Bankruptcy Judge's fact findings should not be disturbed unless the District Court finds them "clearly erroneous", which it did not do herein. Further, these cases cited by Petitioner support the proposition that the Circuit Court is free to view the facts and the

law differently from that of the District Court, whether the District Court affirmed or reversed the Bankruptcy Court.

Contrary to Petitioner's contention at page 36, the Bankruptcy Court not only based the discharge on the taking of the note, but also upon Kohlberg's "positive knowledge" of Walker's financial difficulties and that "according to the law and the evidence, that the specifications in said complaint have not been sustained." (Petition for Certiorari, at 66-67).

Respondent agrees, as an abstract principle, that the taking of a state court judgment on a note does not affect the dischargeability of the debt; Petitioner cites Sweet v. Ritter Finance Co., 263 F.Supp. 540 (W.D. Va. 1967) on this proposition.

The essence of Sweet is that Ritter

Finance did not improve its position by securing a state court judgment against Sweet, that the objector must prove positive fraud, and all the elements of his case, which included reasonable reliance, and fraudulent intent, both of which the Sweet court found the evidence did not support. Hence, the discharge granted by the Referee was reaffirmed.

The other authorities cited in this section of the Petitioner's argument (page 37) support that same proposition, which, it is submitted, has not been at issue here. The purpose of the April 19, 1976 hearing in the Bankruptcy Court was in fact to go behind the judgment and therein the Bankruptcy Judge did in fact go behind the judgment and investigated the matter thoroughly, considered all the evidence and held as hereinabove stated.

II

Petitioner Kohlberg's second contention for review challenges the entry of the April 19, 1976 Order of the Bankruptcy Judge, which Order denied the Petitioner's motion for leave to amend his complaint to assert an additional ground of objection to dischargeability under §17a(4), to be filed after the date fixed by the bar Order under §17c (2).

The bar Order (entered December 15, 1975) fixed March 3, 1976, as the last day for filing complaints alleging nondischargeability under clauses (2), (4), and (8) of §17a. (App. 3). Petitioner's original objection asserted nondischargeability of a debt under §17a(2), alleging the obtaining of money by false pretenses and representations thereunder. (App. 4).

On April 5, 1976, Petioner offered a

paper labeled "Motion to Amend Complaint" which merely paraphrased the language of §17a(4) and alleged no facts and specified no actions, events, omissions, or dates. (App. 6).

After a hearing on the motion, the Bankruptcy Judge did not allow the "Amendment" on the basis that under §17c(2) and Bankruptcy Rule 409, the amendment was not timely filed, that the limitations specified in the bar Order of December 15, 1975, are like the limitations of a statute of limitations, and that after the passing of the last day for filing complaints, a <u>new</u> <u>ground</u> of objection could not be brought in by "amendment" (App. 8).

Under Federal Rule 15(a) and case law, the allowance of amendments lies in the discretion of the trial court and refusal to permit amendments is not subject to review on appeal except for abuse of

discretion.

Comie v. Buchler Corporation (9th Cir. 1971) 449 F. 2d 644; Albee Homes, Inc. v. Lutman (3rd Cir. 1969) 406 F. 2d 11; D'Ippolito v. Cities Service Company (2nd Cir 1967) 374 F. 2d 643; Ziegler v. Atkin (10th Cir. 1958) 261 F. 2d 88; Petzel v. Chicago B. & O. R.R. (8th Cir. 1953) 202 F. 2d 817; Young v. Garrett (8th Cir. 1947) 159 F. 2d 634.

Rule 15 does not, therefore, mandate the granting of such leave nor limit the discretion of the Bankruptcy Judge to deny same.

Rule 15(b), cited by petitioner, provides for the amendment of pleadings to conform to the evidence, which is not applicable here since it was not sought by petitioner, and Rule 15(c), likewise cited, provides for the relation back of amendments which applies when amendments are granted.

It is paramount to note that by its 1970 amendments, Congress has made mandatory the expeditious filing of objections when it provided in §17c(2):

> A creditor who contends that his debt is not discharged under clause (2), (4) or (8) of subdivision (a) of this section must file an application for determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 14 of this Act and, unless an application is timely filed, a debt shall be discharged. (Emphasis added, See also, In re Wooding, 390 F. Supp. 451 (Kansas 1974).

With respect to the fact that the pleading sought to be filed after the bar date is called an "amendment", it is submitted that 1A Collier on Bankruptcy (14th ed.) Section 14.07, at 1290, et seq., and the cases therein cited, fully covers and is dispositive of this issue.

> ...(A)fter expiration of the time fixed by the Court for the filing of a complaint objecting to discharge, additional or new grounds of objection may not be added by amendment, unless the Court first

> grants an extension of time or the bankrupt has concealed facts until that time. To permit an amendment which brings in new grounds of objection after the time fixed for filing complaints objecting to discharge under circumstances other than as noted above would be to defeat Bankruptcy Rule 404(a) which is intended to compel diligent prosecution of objections and permit a prompt disposition of the question of the bankrupt's right to a discharge.

Appellee cites Charles Edward and Associates v. England, 301 F. 2d 572 (9th Cir. 1962) and In re Sturdevant, 415 F. 2d 465 (5th Cir. 1969). These cases are markedly different in that there were timely objections filed in each of those cases, and the question was the allowance of an amendment to make more specific, or to modify allegations as to a specific objection already made, and of course amendment was proper in each of those cases. In the case at bar, there was no timely objection under §17a(4) and consequently nothing to

amend. The term "amendment" is used as a cloak for an attempt to file a new and different objection to dischargeability after the time therefor had passed.

CONCLUSION

1. The Petitioner Kohlberg had positive knowledge of Walker's financial difficulties certainly as early as 1967. The Circuit Court based its decision on Kohlberg's knowledge and the fact that Kohlberg failed to prove reasonable reliance on any representation which may have been made. Petitioner seeks to base his prayer for a writ of certiorari on a proposition which the Circuit Court did not consider or use as a basis for its decision. The fact findings of the Bankruptcy Judge were not "clearly erroneous" and they were approved by the District Judge rather than being found erroneous. The findings of the Bankruptcy Judge were fact findings after

hotly contested and disputed evidence and not mere conclusions or inferences as contended by Petitioner.

2. The Petitioner sought to introduce a new ground of objection under a different subsection of Section 17 of the Bankruptcy Act under the guise of an "amendment," and the Bankruptcy Judge correctly held that this attempt was prohibited under the positive requirement of Section 17c(2) of the Bankruptcy Act and Rule 409 of the Rules of Bankruptcy Procedure.

3. The petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3 (b) of the Rules of the Supreme Court, I hereby certify that service of the foregoing Brief of Respondent Opposing Writ of Certiorari was made on Harry Kohlberg, Petitioner, by depositing three printed copies of the said Brief of Respondent in a United States mail box, with first class postage prepaid, addressed to Howard I. Legum, Attorney for Harry Kohlberg, 720 Law Building, Norfolk, Virginia 23510, on or before the 1st day of February, 1979.

L. S. Parsons

L. S. PARSONS, JR.
Attorney for Respondent,
a member of the bar of
the Supreme Court of the
United States

JOSEPH L. WALKER REALTY CORP.

7831 MILITARY HIGHWAY, NORFOLK 13, VIRGINIA
PHONE 588-5431

TO Mr. Joseph Walker

Via. Mr. Bob Mullins

DATE November 8, 1967

In reference to our discussion relating to deferred tax for current year 1967 my attorney, Owen Pickett, has advised me that the recommendation relative to deferred taxes is acceptable and legal, however, that the land or business venture related to the lots in East Ocean View are not considered as stable collateral.

Therefore, it is requested that my tax bonuses for 1966 and 1967 be deferred to 1968 income and that the 1967 bonus payable on April 15, 1968, be credited to my special account on that date without check transfer.

I anticipate deferring all future 1967 commissions until 1968 for income purposes and such income to be held in a deferred account with interest payable to me at 1% per month.

It is, therefore, definitely anticipated that it will be necessary to pay my 1967 Federal and State income taxes from special account No. 1 prior to tax due dates set up by the State and Federal Government.

By Signed H. Kohlberg

DEFENDANT'S EXHIBIT #4

JOSEPH L. WALKER REALTY CORP.

7831 MILITARY HIGHWAY • NORFOLK 13, VIRGINIA • PHONE 588-5431

DEFENDANT'S EXHIBIT

TO Mr. Joseph [illegible]

Via. Mr. Bob Mullins

DATE

DATE November 8, 1967

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BY

SIGNED H. Kohlberg

INSTRUCTIONS TO SENDER: KEEP YELLOW COPY. 2. SEND WHITE AND PINK COPIES WITH CARBON INTACT.

INSTRUCTIONS TO RECEIVER: 1. WRITE REPLY. 2. DETACH STUB, KEEP PINK COPY, RETURN WHITE COPY TO SENDER.

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